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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

NORTHSTAR FINANCIAL ADVISORS, INC.,
on behalf of itself and all others similarly situated,

Plaintiff,

v.

SCHWAB INVESTMENTS, CHARLES
SCHWAB & CO., INC., CHARLES SCHWAB
INVESTMENT MANAGEMENT, INC., and
SCHWAB TOTAL BOND MARKET FUND,

Defendants.

Case No. CV-08-4119 SI

CLASS ACTION

SUPPLEMENTAL BRIEF IN
SUPPORT OF MOTION TO DISMISS
COMPLAINT

Date: January 23, 2009

Time: 9:00 a.m.

Court: 10

Judge: Hon. Susan Illston

INTRODUCTION

Section 13(a) of the '40 Act provides no express private right of action. We demonstrated, in our moving papers, that no private right of action should be implied for section 13(a). (Open. Br. at 7-9; Reply Br. at 4-6.)

The Court asks whether the recent addition of section 13(c) changes either of these conclusions. Section 13(c) does not create any express right of action under section 13(a). And nothing in the text or legislative history of section 13(c) evidences any congressional intent to recognize an implied private right of action for section 13(a).

BACKGROUND FACTS

Congress adopted section 13(c) on December 31, 2007, as part of the Sudan Accountability and Divestment Act of 2007. Congress passed the Divestment Act out of concern for the ongoing genocide in Darfur. S. Rep. No. 110-213, 2007 WL 5334394 (2007). The Divestment Act was enacted to help increase economic pressure on Sudan to curb this violence. J. R. Crook (ed.), *New U.S. Legislation Authorizes Divestment in Companies Doing Business With Sudan*, 102 Am. J. Int'l L. 370, 370 (Apr. 2008). The Divestment Act authorizes state and local governments, pension funds, and investment managers to divest investments in companies doing certain types of business with Sudan. *Id.* The Divestment Act creates a legal framework by which investors can make these divestments without risk of liability under other laws or regulations. S. Rep. No. 110-213, 2007 WL 5334394.

The Divestment Act accomplishes this result by creating a safe harbor to protect registered investment companies, and their officers, directors, and employees, from all civil and criminal liability under any federal or state law or regulation or the common law. 15 U.S.C. § 80a-13(c). Thus, under section 13(c), "no person" (including any governmental entity) may bring any claim of any kind based upon the divestiture of investments in Sudan. Pub. L. No. 110-74, 121 Stat. 2516, § 4 (2007).

Section 13(c) does not refer to section 13(a); indeed, it does not even refer to the '40 Act. It does not, and was not intended to, create or recognize rights under the '40 Act. The '40 Act was not referred to in the congressional debates. Instead, the debate focused on a state divestment

1 law that had been passed, only to be held unconstitutional and enjoined by a federal court. S.
 2 Rep. No. 110-213, 2007 WL 5334394 (citing *Nat'l Foreign Trade Council v. Giannoulis*, 523 F.
 3 Supp. 2d 731 (N.D. Ill. 2007)).

4 **ARGUMENT**

5 A private right of action may only be implied based upon evidence of a congressional
 6 intent to create a private right of action. *Cort v. Ash*, 422 U.S. 66, 78 (1975); *Alexander v.*
 7 *Sandoval*, 532 U.S. 275, 286 (2001); *Qwest Commc'ns Corp. v. City of Berkeley*, 202 F. Supp. 2d
 8 1085, 1090 (N.D. Cal. 2001). That evidence must be found either in statutory text or legislative
 9 history.

10 Nothing in the text or legislative history of section 13(c) constitutes evidence of any
 11 congressional intent to approve, or recognize, a private right of action for section 13(a). The text
 12 of section 13(c), of course, does not refer to section 13(a). *Alexander*, 532 U.S. at 288 (text of
 13 statute must be beginning of analysis).

14 And nothing in the legislative history of the Divestment Act hints at a congressional intent
 15 to approve or recognize a private right of action for section 13(a). The Divestment Act sweeps
 16 generally and broadly, preempting lawsuits of all kinds — civil and criminal, federal and state,
 17 legal and equitable, statutory and under the common law — against registered investment
 18 companies and their officers, directors, and employees “based solely upon the investment
 19 company divesting from” Sudan. 121 Stat. 2516, § 4. Nothing in the act’s legislative history
 20 suggests that Congress intended to affect, or even thought specifically about, section 13(a). *See*
 21 *Touche Ross v. Redington*, 442 U.S. 560, 571 (1979) (“[i]mplying a private right of action on the
 22 basis of congressional silence is a hazardous enterprise, at best”).

23 For this reason, the first phrase of section 13(c) — “Notwithstanding any other provision
 24 of Federal or State law” — cannot be read as referring to section 13(a) or to any other specific
 25 statutory provision. Nothing in the legislative history even hints that this phrase can be read as
 26 recognizing a private right of action under section 13(a). Similarly, the section’s reference to “no
 27 person” cannot be read to suggest that a “person” could bring a claim under section 13(a) so long
 28 as it did not relate to divestiture of investments in Sudan. Indeed, nothing in the legislative

1 history even explains why this “safe harbor” was added to section 13 of the ’40 Act, rather than
2 added to the ’40 Act as a new section.

3 The adoption of a new statutory provision cannot support an implied private right of
4 action if the amendment does “not ‘in anyway alter the existing rights or action and the
5 corresponding remedies permissible’” under that statute. *Alexander*, 532 U.S. at 292; *AT&T v.*
6 *M/V Cape Fear*, 967 F.2d 864, 876-77 (3d Cir. 1992) (later amendment did not support a private
7 right of action for the Submarine Cable Act of 1888).¹ Moreover, a statutory amendment cannot
8 support an implied right of action when the amendment limits liability rather than creating
9 additional rights. See *Qwest Commc’ns Corp.*, 202 F. Supp. 2d at 1093 (“[i]t is unlikely that
10 Congress, intending to provide a safe harbor for states and localities in subsection (c), would have
11 intended that same provision be used as a sword by telecommunications providers to bring suit
12 against those same parties in federal district court”).

13 CONCLUSION

14 For these reasons, the adoption of section 13(c) does not support any finding of an implied
15 private right of action for Section 13(a).

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17 Dated: January 20, 2009

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24 ¹ This was demonstrated in 1970, when Congress added an express private right of action
25 to section 36(b) of the ’40 Act. Most courts have concluded that “Congress’s explicit provision
26 of a private right of action to enforce one section of a statute suggests that omission of any
27 explicit private right to enforce other sections was intentional.” *Bellikoff v. Eaton Vance Corp.*,
481 F.3d 110, 116 (2d Cir. 2007) (citation and quotations omitted); *M.J. Whitman & Co., Inc.*
Pension Plan v. Am. Fin. Enters. Inc., 552 F. Supp. 17, 22 (S.D. Ohio 1982) (no implied private
28 right of action for § 7(a)), *aff’d*, 725 F.2d 394 (6th Cir. 1984).